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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 616

ALLEGHANY CORPORATION,

Appellant,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

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Alleghany Corporation (Alleghany) appeals from the judgment of the United States District Court for the Southern District of New York entered on October 17, 1957, setting aside two orders of the Interstate Commerce Commission (ICC). Appellant submits this Statement and Application to show that the Supreme Court of the United States has jurisdiction of the appeal and that the judgment of the District Court should be reversed with directions to dismiss appellee's complaint.

Opinions Below and Prior Opinion

Neither the opinions of the District Court nor of the ICC are reported. Copies of the opinion and judgment of the District Court as well as copies of the opinion and orders of the ICC are attached hereto as Appendix A.

The opinion of this Court reversing the earlier judgment of the District Court and remanding, is reported in 353 U. S. 151.

Jurisdiction

This suit was brought under 28 U. S. C. §§ 1336, 1398 and 2321-2325 to set aside orders of the ICC. The judgment of the District Court was entered on October 17, 1957 and Alleghany's notice of appeal was filed in that court on October 25, 1957. The jurisdiction of this Court to review this judgment by direct appeal is conferred by 28 U. S. C. §§ 1253 and 2101(b). There are many decisions sustaining the jurisdiction of this Court to review the District Court's judgment on direct appeal, including this Court's decision on the prior appeal in this case: *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957).

Questions Presented

1. Were the grounds upon which the District Court enjoined, vacated and annulled the preferred stock orders within the scope of and consistent with this Court's remand?

2. After this Court, in upholding ICC's jurisdiction over Alleghany, determined that it was unnecessary to decide whether ICC should have approved Alleghany's control of The New York Central (Central) and remanded this cause "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock

issue as approved by the Commission was in violation of the Interstate Commerce Act", was it error for the District Court to hold that the preferred stock orders must be vacated for failure to secure ICC's prior approval of such control?*

Statutes Involved

Relevant portions of § 5 and § 20a of the Interstate Commerce Act, as amended, 49 U. S. C. § 5 and § 20a, are set out in Appendix B hereto.

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* If the judgment of the District Court is within the scope of and consistent with the decision and remand of this Court, the following additional questions are presented:

A. Does 49 U. S. C. § 5(7) mandate investigation and punishment of violations of the Interstate Commerce Act by ICC in the circumstances presented in this proceeding, and if so, must such action by ICC be taken before it may lawfully exercise its regulatory jurisdiction (including jurisdiction with respect to security issues) over alleged violators of the Act?

B. Did the District Court err in concluding that under 49 U. S. C. § 5(2) the obtaining by Alleghany of control of Central required ICC approval?

C. Assuming that Alleghany's obtaining control of Central required ICC approval, was it necessary in the circumstances presented in this proceeding for such approval to be obtained prior to the submission of Alleghany's proposed exchange offer to its stockholders and ICC's approval of the exchange offer?

D. Did plaintiffs have standing to raise the issues involved?

E. In view of 49 U. S. C. § 20a(11), can the 6% preferred stock of Alleghany be invalidated?

F. Did the District Court err in substituting its conception of sound administrative procedure under the Interstate Commerce Act for that of ICC?

G. Did the District Court err in setting aside the preferred stock orders of ICC in this action?

Statement

The prior history of this proceeding is set forth in the opinion of this Court rendered April 22, 1957 in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957). Briefly, plaintiffs first brought an action to review orders continuing ICC's jurisdiction over Alleghany, a non-carrier declared by ICC (and by the Securities and Exchange Commission) to be subject to ICC jurisdiction, and later amended their complaint to seek the overturn of orders of ICC entered May 26, 1955 and June 22, 1955 authorizing Alleghany, to issue new 6% convertible preferred stock in exchange for old preferred stock substantially in arrears. On December 23, 1955 the District Court entered judgment pursuant to its decision of November 18, 1955 (138 F. Supp. 123) vacating the preferred stock orders on the ground of lack of jurisdiction in the ICC and the existence of exclusive jurisdiction in the Securities and Exchange Commission (SEC). This Court reversed, holding that ICC, not SEC, had jurisdiction and that, contrary to the opinion of the District Court, it was unnecessary to determine whether the acquisition of control by Alleghany of Central should have been approved by ICC before entry of the challenged orders. It remanded only one narrow question:

> "consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. . . ."

The District Court on September 27, 1957 filed its opinion and on October 17, 1957 entered its judgment again vacating the preferred stock orders of ICC because, it again held, Alleghany must secure ICC approval of its control of Central and had not done so. The District Court sustained the position of Alleghany and ICC that the orders of ICC approving the preferred stock exchange were adequately supported in all other respects and conformed to the requirements of § 20a of the Act. The District Court stated that it conceded the jurisdiction of ICC but found fault with its exercise, holding that, absent unusual circum-

stances, ICC should not have entertained the application for approval of the issuance of the preferred stock, if at all, until it decided the propriety of Alleghany's control of Central. Thus the District Court decided the one question remanded to it in favor of Alleghany; went on to decide an additional question not remanded to it; and decided that question erroneously and in such a way as to negate the earlier action of this Court. In so doing it denied the authority of ICC to approve the stock issue.

The necessity of approval by ICC of the control by Alleghany of Central was considered, but not decided, by this Court upon the prior appeal. This Court held that it need not resolve the conflict between ICC and the District Court as to the necessity of approval by ICC of Alleghany's success in the proxy contest. The mere existence of that control, whether or not approved, was held by this Court to be significant, and in affirming ICC's jurisdiction to issue the preferred stock orders there seemed to this Court "to be no reason to read in the word 'approved'" (*infra* p. 8). The District Court's decision was that approval of control of Central was required before that jurisdiction could be exercised. Thus its decision flies in the face of this Court's disposition of the matter.

The question of the necessity for ICC approval of this control is not a new issue. It first arose during the course of Alleghany's proxy campaign. Three separate petitions questioning the right of Alleghany to seek control of Central were filed with ICC, not by appellees here, but by Central and groups allied with the then management. One in particular, filed April 6, 1954, prayed an order declaring that Alleghany could not seek such control without prior ICC approval. This petition was dismissed. One of the others was also dismissed and the third was withdrawn. All of this appeared in the ICC report in the record before this Court on the prior appeal and before the District Court on the remand (R. 420-422).*

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* References are to pages of the printed record on the prior appeal (No. 36, October Term, 1956). The entire record in the prior appeal has been certified to this Court on this appeal.

After Alleghany's successful proxy contest, Alleghany and Central filed with ICC applications for the approval of a merger of certain subsidiary carriers of Central, the lease of their properties and the continuation of control by Central and Alleghany over such subsidiary carriers (R. 210). The status orders approving the merger and lease and the continuance of such control were entered March 2, 1955 and May 24, 1955 (Louisville & Jeffersonville Bridge & Railroad Company Merger, etc.; R. 414, 506). These orders continued Alleghany's subjection to regulation as a non-carrier in control of carriers for many purposes, expressly including security issues under § 20a.

After ICC had approved still another acquisition of control of carriers by Alleghany (Boston & Albany Railroad Company et al. Control Report; R. 450), Alleghany was authorized to issue its new preferred stock by order of May 26, 1955, two days after final affirmance by ICC of the Louisville & Jeffersonville merger and lease application (R. 518). After dismissal of plaintiffs' petition for reconsideration, final approval of the issuance of preferred stock was granted June 22, 1955 (R. 554).

All of these orders were stricken down by the December 23, 1955 judgment of the District Court, which held that jurisdiction over Alleghany was in SEC, not ICC. It was this judgment which this Court reversed and remanded, holding ICC had jurisdiction to enter all of the orders, including those approving the preferred stock exchange offer. The District Court, however, has disregarded the limited nature of the remand and has undertaken to go beyond it and hold that ICC had jurisdiction only to discipline Alleghany, but could not approve the issuance of its preferred stock in this case.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

This Court should summarily reverse the judgment of the District Court.

Although the action of the District Court raises substantial questions for this Court's determination, we submit such questions should be decided summarily by this Court in favor of Alleghany.

The decision of the District Court is patently in conflict with the decision and mandate of this Court in *Alleghany Corp.* v. *Breswick & Co., supra.* The effect of the District Court's decision is to reaffirm its judgment of December 23, 1955, disregarding the intervening reversal by this Court.

The District Court once again holds Alleghany could not legally acquire control of Central in a proxy contest without ICC approval. In so doing, the District Court pays only lip service to the judgment of this Court. When it reversed the District Court's 1955 judgment vacating the preferred stock orders, this Court said (353 U. S. at 161):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'
>
> The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory

requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved.' Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction.

Control in fact then is sufficient to satisfy the requirement of § 5(2).

• • •

For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. • • •"

The remand, limited to "appellees' claim, not previously discussed", clearly reflects this Court's intention to return to the District Court only those contentions attacking the preferred stock orders which were previously advanced by the appellees (plaintiffs) and not mentioned in this Court's opinion. These claims included such points as the alleged unfairness of the preferred stock exchange offer and the claim that the findings of ICC were not adequately supported. They had not been "previously discussed" by this Court. On the other hand, the question of the necessity for ICC approval of Alleghany's control of Central was discussed by this Court in its opinion (*supra*, pp. 7-8) and therefore was not within the remand.

After the remand by this Court, the plaintiffs reiterated in the District Court their numerous attacks upon the preferred stock exchange offer. Each of the plaintiffs' asser-

tions was answered by the defendants and each was fully briefed and argued. The District Court in its opinion (Appendix A, pp. 23-25) dealt separately with each of the plaintiffs' contentions attacking the preferred stock orders and rejected them all. The District Court, however, despite the holding by this Court that the question of the necessity of ICC approval of Alleghany's control of Central need not be resolved, itself raised the question at the argument, rejected defendants' assertion that the matter was not within the remand and concluded by reasserting its previous position that Alleghany's control over Central is illegal. On that ground, the District Court vacated ICC's preferred stock orders. It is untenable to suggest, as the District Court seems to do, that this Court, in squarely holding it unnecessary to resolve the control question to sustain ICC jurisdiction, intended the control question to be determinative of the merits of the preferred stock issue and thus overlooked the decisive issue in the case.

It is evident from the District Court's opinion that despite the previous ruling of this Court, it refuses to give up its predeliction for regulation of Alleghany by SEC rather than by ICC. Whereas this Court conclusively established that ICC, not SEC, had jurisdiction of Alleghany and held that it was not necessary in reaching that decision to rely on any authorization by ICC of Alleghany's control of Central, the District Court now suggests the ICC should consider "whether it will authorize the continuation of [Alleghany's] control [of Central], upon which its jurisdiction over Alleghany depends." Until such time, the District Court states, ICC should not approve the preferred stock exchange offer.

The preference for regulation of Alleghany by SEC, evident in the 1955 opinions of the District Court, recurs in other portions of its 1957 opinion. It states "the assumption of regulatory responsibility by the Commission [ICC] shields the person guilty of the unapproved acquisition [Alleghany] from regulation by another agency [SEC]"

(Appendix A, p. 26). In another part of the opinion the District Court reiterated the same theme in stating that unless the ICC intends to approve Alleghany's control of Central "it would be granting a wrongdoer sanctuary from the Investment Company Act" (Appendix A, p. 30).

Although the District Court asserts that it has recognized ICC's jurisdiction, it is respectfully submitted it has not correctly read this Court's holding on the point. This Court determines, not abstract generalities considered in a vacuum, but concrete controversies in the light of the factual context in which they arise. We believe this Court's prior opinion determined, not a loose unoriented question of whether ICC had "jurisdiction" over Alleghany, but the specific, concrete question posed which was whether ICC had *jurisdiction over Alleghany's preferred stock application.* Indeed, this Court held that it was only for the purpose of questioning the preferred stock orders, as distinguished from the orders imposing on Alleghany the status of a carrier entered in the Louisville & Jeffersonville merger proceeding, that plaintiffs had any standing to sue at all. Since this Court decided the question affirmatively, the District Court is not now free to hold that, while ICC had an undefined, general suzerainty over Alleghany, it still lacked power to exercise its jurisdiction over the preferred stock application.

The District Court's opinion states (Appendix A, p. 25) that one of the principal questions the District Court had to determine with respect to ICC's procedure in approving the preferred stock issuance, although failing to approve Alleghany's control over Central, is "may the Commission [ICC] proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control [Alleghany's control of Central], upon which its jurisdiction over Alleghany depends." This is inconsistent with the holding of this Court on the prior appeal. The holding of this Court was that ICC had jurisdiction to issue the preferred stock

orders irrespective of any approval by ICC of Alleghany's control, or continuance of control, of Central. It was only on this basis that this Court could have sustained ICC jurisdiction without passing upon whether ICC needed to approve Alleghany's control of Central. The District Court by its action has reduced this Court's holding to a meaningless abstraction.

The inconsistency of the District Court's decision is even more apparent in the reasoning of its opinion. To answer in the negative, as the District Court did, the question it propounded as to whether ICC could "proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control" must logically mean that ICC could proceed to no regulatory determinations until the question of Alleghany's control of Central was passed upon. Yet, if this be so, ICC's "regulatory determination" of the validity of Alleghany's acquisition of control of the Louisville & Jeffersonville was just as improper as the District Court finds the determination of the preferred stock question to be. This Court, however, has conclusively held that the regulatory determination with respect to the Louisville & Jeffersonville merger was proper. Nevertheless, even now the District Court persists "that Alleghany's unauthorized seizure of control of the Central *and its subsidiaries* was unlawful, and that this continued control *of these carriers* is unlawful as well" (Appendix A, p. 27, emphasis supplied). As if for emphasis, the District Court adds that Alleghany "now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control *of a carrier* would be consistent with the public interest" (Appendix A, p. 29, emphasis supplied). Not only has Alleghany satisfied ICC that its control of "a carrier" would be consistent with the public interest, it has also satisfied this Court that such is the case. Only the District Court remains unpersuaded.

In view of the conclusion of the District Court that plaintiffs' attacks upon the preferred stock exchange offer —the only matters remanded—were without merit, proper conformity with the mandate of this Court required that the District Court dismiss the complaint.

That a lower court is not at liberty to disregard or evade the mandate of this Court needs no argument. As this Court said in reversing for a second time the judgment of a state court in *Tyler* v. *Magwire*, 17 Wall. 253, 282 (U. S. 1872):

> "By the directions of the mandate they [the lower court] were as much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree, but instead of that they entered a new decree dismissing the petition, which in effect evades the direction given by this court, and practically reverses the judgment and decree which the mandate directed them to execute."

See also *Briggs, Administratrix* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948) and cases cited therein.

Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e. g. *United States* v. *Palletz*, 330 U. S. 812 (1947), and five subsequent cases summarily reversed on the authority thereof reported in 330 U. S. 812 and 331 U. S. 791 (1947)) but also where the action of the lower court was clearly improper (*Franklin* v. *Jonco Aircraft Corporation*, 346 U. S. 868, reh. den. 346 U. S. 917 (1953)). Similarly, where following a denial of certiorari to a state court, a Federal District Court entertained a new action between the same parties and granted the relief which had been denied in the state court action, this Court granted a motion for summary reversal on appeal. (*White* v. *Howard*, 347 U. S. 910 (1954)). Summary procedure has been employed in cases arising under the Urgent Deficiencies Act. (*Riss & Company* v. *United States*, 342 U. S. 937, reh. den. 343 U. S. 927 (1952)).

Nearly two years ago Alleghany in its statement as to jurisdiction filed in connection with the first appeal to this Court referred to the hardship created by the action of the District Court in vacating these same preferred stock orders in December of 1955. What was said then is essentially still true.* The passage of time has only intensified the hardship. Whereas at that time the District Court had not passed upon the fairness or desirability of the preferred stock exchange offer, it has now ruled that ICC's approval of the exchange offer was within its competence. Nevertheless, for essentially the same reasons as before, the District Court has once again vacated the preferred stock orders. In view of the crowded condition of this Court's docket, which may prevent this case from being reached for argument in regular course for many months, the decision of the District Court will necessarily prolong and aggravate the hardship to Alleghany and its security holders unless this Court grants summary reversal.

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* * * * * The destruction of the exchange offer was decreed by the District Court without any consideration of its essential fairness and desirability. From the dry and sterile conclusion that there were jurisdictional and procedural flaws in the I. C. C.'s assertion of jurisdiction over Alleghany, the District Court swept forward to a destruction of the exchange offer and invalidation of the orders permitting the stock issuance under circumstances which place Alleghany and all its stockholders in extreme distress. * * * Nine hundred thousand shares of the new preferred stock were physically delivered to their rightful holders, and 400,000 shares were in the hands of the exchange agent for transmission to the old preferred stockholders, when the District Court's original ex parte restraining order took effect, precluding any further delivery or transfer of the preferred stock. The cloud thus created still hangs over the stock issue with the result that, despite a partial stay of the injunction with respect to transference of the 900,000 shares delivered prior to the effective date of the restraining order, trading in the entire issue of 6 percent convertible preferred stock continues suspended on the New York Stock Exchange and the National Association of Securities Dealers has admonished its member firms to refrain from taking part in any trading of this security. Alleghany preferred stockholders, whether they received physical delivery of their new stock certificates or not, thus have had their asset frozen and are unable either freely to sell or hypothecate their Alleghany preferred stock."

II.

The decision of the District Court on other questions was also erroneous.

Alleghany believes that the action of the District Court, being outside the scope of and inconsistent with the terms of this Court's remand, should be summarily reversed. If, however, this Court should deem it desirable that the case be set down for full argument, additional substantial questions are presented as noted in the footnote to page 3 of this Statement. Considerations bearing upon the substantial nature and importance of these questions are outlined in this Part II.

1. The District Court found its starting point in §§ 5(4) and 5(7) of the Interstate Commerce Act, which prohibit acquisition of control of carriers in violation of § 5(2) and provide for such action by ICC as it shall deem necessary to remedy violations found by ICC. In so doing, it disregarded the approved control of Alleghany over subsidiary carriers of Central considered and affirmed by this Court on the prior appeal, and held that absent unusual circumstances, ICC was prevented by these sections from granting an application by Alleghany for approval of the issuance of securities. By its action, the District Court has injected in § 20a proceedings a requirement of findings not contemplated or required by Congress in enacting the statute. So far as Alleghany can ascertain, neither ICC nor any court has previously considered § 5(7) to so sap the meaning and requirements of § 20a.

2. The District Court sought justification for its position in § 20a of the Act. Pointing out that § 20a was passed to insure sound railroad financing and to protect the investing public against dissipation of railroad resources, it argued that the adequacy of the security of the new preferred stock could not be determined until ICC had acted under § 5(7). The District Court arrived at this result by assuming that divestiture by Alleghany of its shares of

Central might be ordered by ICC, and that the remaining assets might then be insufficient to cover the new issue of preferred stock.

As ICC implicitly recognized, the underlying assets of Alleghany, and hence the security for the new preferred, are neither relevant nor material when the authorization sought is to issue new in exchange for old preferred shares and where the par value of the new preferred stock is not greater than that of the preferred stock for which it is to be exchanged. This is particularly so where the claim of the new preferred stock against the assets of Alleghany in the event of bankruptcy would be substantially reduced by reason of the exchange. The purpose of the exchange was to wipe out the claim of the old preferred stock to $17,862,185 of accrued dividends, a sum greater than Alleghany's investment in Central stock adverted to by the District Court.

Asset coverage is significant only when a new, as distinct from a refunding, security is to be issued or the security to be issued has a greater par or stated value than the one it replaces. To the Alleghany old preferred stockholder who received in exchange shares of new preferred stock, it would not matter whether he held his old certificate or the new one at the time ICC approved or disapproved Alleghany's control of Central. Any cloud upon the value of the stock that would attach to the new preferred stock would similarly and to the same extent have attached to the old preferred stock he surrendered in the exchange. Therefore, the District Court was in error in concluding that the possible effect of an ICC order on Alleghany's control of Central was relevant to authorization of the preferred stock exchange. There is no logical reason so far as protection of investors in Alleghany stock is concerned why ICC should necessarily act on Alleghany's control of Central prior to the time the opportunity to exchange was tendered to them.

The District Court overlooked the fact that even if Alleghany were required by ICC to divest itself of its Central stock, the money received from such sale would be an asset

securing the new preferred stock. If market value is used in determining the value of this asset to the preferred stockholders, the Central stock or the proceeds from its sale would be the same, less broker's commission if sold through a broker.

The plaintiffs lack standing to raise this issue of the adequacy of the security for the new preferred stock and in fact no such issue was raised by them in any of their pleadings filed with ICC. The plaintiffs are common, not preferred, stockholders and therefore clearly could not properly raise an issue which could have relevance only to the new preferred stock. It could not possibly affect dilution, the only basis upon which the plaintiffs acquired standing in these proceedings (353 U. S. at 159, 174). The persons who might raise an issue on the adequacy of the security underlying the new preferred stock would be the preferred stockholders and they, though present and represented by counsel throughout the many court proceedings in this case, have not done so. In these circumstances the District Court had no party before it competent to raise this issue which it injected.

3. The question of the legality of Alleghany's control of Central, if it has any relevance, could conceivably relate only to the validity of the status orders. This Court has not found it necessary to decide that question even to sustain the status orders. These were the orders which approved the continuation of Alleghany's control over subsidiaries of Central. This Court held they were properly entered, that they continued ICC jurisdiction, and precluded SEC jurisdiction. It is not necessary to determine the propriety of control of Central before ICC can authorize the issuance of securities. Yet the District Court would disregard this Court's decision, hold the irrelevant relevant, and consequently prohibit ICC approval of the preferred stock issuance because ICC did not first approve the questioned acquisition of control of Central.

The District Court purports to distinguish the preferred stock orders from the status orders on the ground that the former are for "the private benefit of Alleghany" while

the latter are something different. In so doing, however, it must necessarily disregard the fact that the requirement of approval of security issues is not a favor dispensed by ICC, but a limitation imposed on the freedom to issue securities enjoyed by most corporations not subject to the requirements of regulatory statutes. The Court's cavalier attitude towards the importance of ICC regulation long recognized by Congress points up again its determined preoccupation with its preference for SEC regulation—a matter which it should have regarded as laid at rest by this Court's decision.

In vacating the preferred stock orders, the District Court did not consider the provisions of § 20a(11), although the applicability of this section was urged by all defendants. While this section has apparently not been construed, by its terms it prohibits just such action as was taken here by the District Court in invalidating securities of a carrier subsequent to their issuance pursuant to orders of I. C. C. At the time of the District Court's initial restraining order all shares of the new preferred stock had been issued, and in fact nearly 900,000 had also been delivered by the exchange agent. The entire issue, therefore, was within the protection afforded by § 20a(11).

4. In setting aside the ICC orders, the District Court once again reasserted its previous conclusion that the acquisition by Alleghany of control over Central in a proxy contest required the approval of ICC. While this question was fully briefed and argued on the previous appeal, this Court found it unnecessary to resolve it. Alleghany submits that it was equally unnecessary and, indeed, improper for the District Court to resolve this question on remand in view of the very precise and limited character of the question remanded.

The District Court's decision not only places an important limitation upon the freedom of interstate carrier stockholders to rid their company of inefficient management but casts a cloud as well upon the legality of a vast array of corporate actions of any integrated carrier systems whose control has changed in one way or another. Changes

in control of these carriers are not limited to recent highly publicized proxy contests but may occur without notoriety as a result of reorganization*, the release of controlling stock of a carrier from a voting trust**, the sale of carrier stock by controlling persons***, the distribution of carrier stock as a dividend in kind by a corporate owner****, the replacement of chief executive officers, members of the board of directors or both for one reason or another† as well as many other ways or combinations of ways‡. If the District Court's decision correctly states the law, then indeed changes in management may no longer be possible since in the relatively short time between annual elections it is doubtful that an insurgent group could obtain the necessary approval in time to conduct a campaign. But far more importantly, since control of integrated carrier systems has constantly shifted in the past several decades, without any ICC approval, there may scarcely be a legal railroad management in the land and innumerable actions taken by these unapproved managements may be vulnerable to attack on the precise basis the District Court uses to invalidate Alleghany's preferred stock issuance.

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* For example, New York, New Haven & Hartford R. R., Chicago & NorthWestern Ry., Missouri Pacific R. R. and Chicago, Rock Island & Pacific R. R.

** For example, Monon Ry., Denver & Rio Grande Western R. R., and United States Trucking Company.

*** For example, Missouri-Kansas-Texas R. R., Chesapeake & Ohio Ry. and Chicago, Great Western Ry.

**** For example, New York, Chicago & St. Louis R. R. and Wheeling and Lake Erie Ry.

† To name only a few dramatic instances, Missouri Pacific R. R., Central of Georgia Ry., Boston & Maine R. R., Chicago & Eastern Illinois R. R., Delaware & Hudson R. R., Greyhound Corporation, Chicago, Milwaukee, St. Paul & Pacific R. R., and Chicago & North-Western Ry. all have in recent years made changes in their executive committees, boards of directors or chief executive officers.

‡ For example, by testamentary disposition the owner of control of the Western Pacific R. R. vested the controlling interest in the hands of the Executor of his Estate and control of the Missouri-Kansas-Texas R. R. also shifted on death of the stockholder having control.

Conclusion

The District Court resolved all questions remanded to it by this Court in favor of the validity of the orders of ICC in this proceeding. It vacated such orders upon grounds not within the terms of the remand of this Court and in direct conflict with the decision of this Court on the prior appeal. In so doing it erroneously decided substantial questions of public importance. It is respectfully submitted that this Court should note jurisdiction and summarily reverse the final judgment of the District Court, with directions to dismiss appellees' complaint. If summary reversal is not granted, all the questions presented should be considered and none is waived even though not specifically discussed herein.

Respectfully submitted,

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APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Plaintiffs,

against

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, et al.,

Defendants.

} CIV. 101-114

BEFORE:

CLARK, Circuit Judge and

DIMOCK and WALSH, District Judges

APPEARANCES:

ROSSTON, HORT & BRUSSEL, ESQS. (GEORGE BRUSSEL, JR., and EUGENE G. KING, Of Counsel) for Breswick & Co. and Myron Neisloss

RANDOLPH PHILLIPS, Pro Se

ROBERT W. GINNANE, ESQ., General Counsel for Interstate Commerce Commission (B. FRANKLIN TAYLOR, JR., Assistant General Counsel, with him on the brief)

NOTE: Footnotes are printed following text of opinion.

SIMPSON, THACHER & BARTLETT, ESQS.,
WHITE & CASE, ESQS.,
WHEELER & WHEELER, ESQS., (WHITNEY NORTH SEYMOUR, DAVID HARTFIELD, JR., EDWARD K. WHEELER, and DAVID W. WALLACE, Of Counsel) for Alleghany Corporation

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS., (HAROLD H. LEVIN, MARVIN E. FRANKEL and ALLEN L. FEINSTEIN, Of Counsel) for Defendants Joseph S. Gruss, et al.

EDWARD M. GARLOCK, ESQ., for Defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

SAMUEL A. MEHLMAN, Pro Se

ALEXANDER KAHAN, ESQ., and,
A. LICHTENSTEIN, ESQ., (ALEXANDER KAHAN, Of Counsel) for Adelaide Neuwirth and common stockholders of Alleghany Corporation, representatively.

WALSH, D.J.

Plaintiffs, common stockholders of Alleghany Corporation, by this action seek review of an order of the Interstate Commerce Commission authorizing Alleghany to issue certain stock.[1] We had previously held that the Commission lacked jurisdiction to promulgate the order and that the issue was subject to the Investment Company Act. The Supreme Court reversed this holding and held that the issue was subject to the Interstate Commerce Act. It remanded the case to us for consideration of plaintiffs' claim that the issue violated that Act.[1a]

The stock in controversy consisted of 1,367,440 shares of 6% preferred stock having a par value of $10 to be offered ten for one in exchange for the pre-existing 5½% preferred, having a par value of $100. It was to be convertible at the option of the holder into common stock,

according to a formula which resulted in an actual conversion ratio of 4.7 shares of common for each share of new preferred, upon payment to the corporation of $3.75 per common share. The issue of the common stock necessary for conversion was also authorized.

Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts. They claim in substance that the worth of the old preferred was overestimated by giving it a value of $100 par value, plus $5 redemption premium, plus $132 accumulated dividends; that it was improper to include the redemption premium and to assume that the dividends would be readily payable in cash. They suggest that the market value, which never previously exceeded 170, was more realistic and should have been used They also claim that the value of the new preferred was underestimated; that in particular the value of the fifteen year non-call period allowed for conversion was overlooked entirely, although it became markedly apparent when, after the plan of exchange was announced, the market price of the preferred exceeded the $237 value assumed for purposes of the exchange, by almost fifty percent. In other words whereas the old preferred had never sold above $170 prior to the announcement of the plan, its equivalent in the new preferred traded upon a "when issued" basis rose to 352½ prior to the suspension of trading. They claim that the excess of 352½ over 170 represents a "premium" to the preferred stockholders, an excessive benefit at the expense of the corporation and also the common stockholders.

In answer it is contended that the offer of the exchange was the only feasible way in which to get rid of the burden of accumulated dividends without requiring a large outlay of cash; that the benefits to be given the new preferred in order to make the exchange attractive was primarily a matter of business judgment; that the market action of the preferred does not indicate that an excessive premium was given it at the expense of the common because a substan-

tial part of the increase paralleled an increase in the common into which the new preferred was convertible.

As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed.

Plaintiffs also protest that the Commission conditioned its approval upon the change in plan never ratified by the stockholders. The proposed plan had provided that the conversion ratio should be fixed as of the fifth market day following Commission approval. The Commission conditioned its approval upon modification of the exchange offer so that the conversion ratio would be fixed as of the last market day preceding its order. The Commission has power to grant the application "upon such terms and conditions as the commission may deem necessary or appropriate in the premises". 41 Stat. 394, 49 U. S. C. § 20a(3). The question whether the exchange would involve a violation of some contractual arrangement with the stockholders is not before us. This contention does not affect the validity of the Commission's order.

As to matters of procedure, plaintiffs complain that they were entitled to an evidentiary hearing before the Commission and that they were deprived of that right. This point was raised before the Supreme Court and, if not decided adversely to them, we understand the Supreme Court's statement that the point is governed by section 20a(6) of the Interstate Commerce Act, 41 Stat. 439, 49 U. S. C. § 20a(6), to restrict our consideration to the effect of that section. Under that section the Commission has almost free discretion as to how it may best proceed with its investigation. It was not required as a matter of law to hold evidentiary hearings to enable plaintiffs to amplify by cross-examination of corporate officers points already

ascertainable from facts before it. Plaintiffs urge the admitted complexity of the plan and the heavy investment in preferred stock by the dominant officer of Alleghany just before announcement of the plan. They also show that by refusing to thus open its investigation the Commission apparently missed evidence subsequently supplied to the Securities and Exchange Commission, such as a memorandum from Alleghany's files discussing the value of the non-call period, the minutes of the board meeting which are said to show that this feature was not in the plan when originally approved, and an analysis of the market action of earlier conversion warrants which might have foretold the market action of the preferred after the present plan closed. Loss of this type of evidence is, however, a known risk which an agency takes when it declines to open its investigation to controversy. The Commission is given that power by statute.

There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested. We do not raise again the question of jurisdiction;[2] but we now raise the question of findings necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act.

The facts now established are that Alleghany has control of the New York Central and that the Central is itself a carrier with control of a large number of other carriers. The Commission was never asked to approve Alleghany's acquisition of control over this group of carriers and has carefully refrained from so doing.[2a]

This problem presents two separate questions: (1) does the acquisition of an already integrated system of separately existing carriers require Commission approval under subdivision 2 of section 5; and (2) if it does, may the Commission proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control, upon which its jurisdic-

tion over Alleghany depends. The second question becomes more pointed where, as here, the assumption of regulatory responsibility by the Commission shields the person guilty of the unapproved acquisition from regulation by another agency.

With respect to the first question, until this case arose, it had been the consistent view of the Commission that its approval of such an acquisition of control and its finding of consistency with the public interest was required. *Arkansas & L. M. Ry. Co.-Control,* 281 I. C. C. 254; *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127; *Seaboard Air Lines Ry. Co.-Receivership,* 261 I. C. C. 689. This view was well expressed by Division 4 in its opinion with respect to Alleghany's application for authority to merge one of the Central's subsidiaries, the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 723, 732-4.[2b] The full Commission departed from this position and held to the contrary. 295 I. C. C. 11, .[3] We reversed the Commission holding[4] and we in turn were reversed upon other grounds. The Supreme Court left the question open.[5]

Without going into the question of whether our previous determination in this regard remains the law of the case we express afresh our conclusion that such approval is required. The statute unequivocally requires Commission approval for the acquisition of two or more carriers by any person. It reads:

> "It shall be lawful, with the approval and authorization of the Commission • • • for a person which is not a carrier to acquire control of two or more carriers • • • ". (§ 5[2][a]).

Its language does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. This was the un-

challenged prior consistent administrative interpretation by the Commission.[6] The full reasons for our holding were expressed in our earlier opinion at 134 F. Supp. 132, 142, and in Appendix II to our per curiam opinion at 138 F. Supp. 123, 137. We reaffirm them. We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system (353 U. S. at p. 170).

If our conclusion in this regard is to stand, subdivision 4 of section 5 provides in emphatic terms that Alleghany's unauthorized seizure of control of the Central and its subsidiaries was unlawful and that its continued control of these carriers is unlawful as well.

Subdivision 7 of that section mandates action by the Commission to compel correction of violations of this particular subdivision, once the facts are known. It provides:

> "The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). *If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.* The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) and (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by another person." (Emphasis added).

Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation which would proceed concurrently with the investigation concerning Alleghany's application. Here, however, there is no question of further investigation; the facts are undisputed; the Commission's findings are complete.[7] This point was inescapable because

the Commission's power to pass upon the issuance of stock by Alleghany which it exercised depended upon the fact that Alleghany controlled the New York Central system. The question is simply one of law. The Commission, after reversing Division 4, proceeded to the merits of Alleghany's various applications, on the assumption that Alleghany's control of the carriers in question was lawful. This view was erroneous.

Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question is resolved or at least considered. Alleghany's investment in the Central system, as last shown in the record, was $14.7 million, over ¼ of its total portfolio.[8] As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions.[9] The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made,[10] authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commissioner's duty under section 20(a) is for the protection of investors as well as persons dependent upon transportation.[11]

Neither do we see how an order for the private benefit of Alleghany may be said to be in compliance with the Act when Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act, is that of a wrongdoer in unlawful control of a group of carriers. Here there is no finding of public advantage to be gained from granting Alleghany's application. Unlike the status order which made available to the Commission infor

mation for the protection of the public or even the merger of the Bridge Company which was expected to produce operating economies of ultimate value to the public, the present order is unaccompanied by any finding of fact which would suggest a rational basis for action in advance of an investigation into the legality of Alleghany's acquisition of control. Here an investment company has been barred from issuing the stock in question by the Securities and Exchange Commission. In violation of the Interstate Commerce Act it has obtained control of a group of carriers. Solely upon the basis of this violation it now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest. The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.

Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control[13] and usually compelled divestiture[13] except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval was in good faith[14] due to an

oversight. Reopening of the Commission proceeding is necessary so that the Commission may give consideration to such findings here.

Finally, for even more fundamental reasons this order must be set aside. Although the Supreme Court has eliminated all doubt as to the Commission's jurisdiction—its power to decide the question here presented—it has not excused it from the need for making this decision, and making it in a logical sequence with respect to other regulatory decisions. The sequence of Commission determination may not be in arbitrary and capricious disorder; it must have a rational basis just as each order must in itself have such a basis. The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would be so great that it would necessarily be discarded as a practical alternative.[15]

We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end

every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order.[16] The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that in the absence of any finding that the public interest compelled such action,[17] relief be granted for the benefit of the wrongdoer notwithstanding his wrong.

We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central system, there were no findings of facts which justify such action in the present case.

Accordingly, judgment must be granted in favor of plaintiffs. A judgment will be entered setting aside the order of the Commission authorizing the issue of the preferred stock and enjoining acts of the defendants in furtherance thereof. Defendants may apply for a thirty day stay of enforcement to enable them to perfect an appeal to the Supreme Court. The preliminary injunction in its present form shall continue until further order of the Court.

Settle order on notice.

CHARLES E. CLARK
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

Dated: September 27, 1957.

FOOTNOTES

[1] Briefly the history of this proceeding is as follows:

Mar. 2, 1955—Division 4 of I. C. C. ordered that Alleghany be considered as a carrier subject to its regulation. 290 I. C. C. 725.

Apr. 6, 1955—Plaintiffs, in a related action, *Breswick* v. *Briggs*, sought injunction of present stock issue. The application was denied to permit I. C. C. to give prior consideration to plaintiffs' claim. 130 F. Supp. 953.

May 24, 1955—Full Commission affirmed Division 4's holding as to status. 295 I. C. C. 11.

May 26, 1955—Division 4 approved present stock issue.

June 6, 1955—Present action commenced by plaintiffs. No application was made for temporary injunction pending final disposition by I. C. C.

June 22, 1955—Full Commission denied reconsideration of order authorizing stock issue. Notwithstanding plaintiffs' application for a stay the order was made effective immediately.

June 23, 1955—This order was made public but notice thereof was not given plaintiffs. Alleghany immediately commenced issuance of the stock pursuant to the authorization of the Commission.

June 23, 1955—Plaintiffs, having learned of the Commission order after two-thirds of the stock had been issued, obtained a restraining order staying transactions with respect to the stock pending disposition of this proceeding.

July 21, 1955—A preliminary injunction was granted by this Court (Hincks, C. J. dissenting). 134 F. Supp. 132.

Aug. 3, 1955—The preliminary injunction was stayed by Mr. Justice Harlan as to that part of the stock issued before this Court's restraining order was granted. 75 S. Ct. 912.

Nov. 18, 1955—Enforcement of the I. C. C. order and issuance of the stock was permanently enjoined,

it being held that the Commission was without jurisdiction over Alleghany. 138 F. Supp. 123. Frank, C. J. had replaced Judge Hincks as a member of this Court. This Court stayed the injunction pending appeal. The preliminary injunction, as modified by Mr. Justice Harlan, was continued.

Apr. 22, 1957—Supreme Court reversed our holding but declined to vacate the preliminary injunction, remanding the case for consideration of claims not previously considered as to the failure of the Commission's order to comply with the Interstate Commerce Act. 353 U. S. 151.

June 14, 1957—An application to this Court to vacate the preliminary injunction was denied. Chief Judge Clark had replaced the late Judge Frank as a member of this Court.

[1a] The scope of the remand was stated as follows, 353 U. S. at p. 175:

"For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. * * *"

[2] The Supreme Court held that jurisdiction could be based upon its unapproved acquisition of control as well as approved. (353 U. S. at pp. 161-2). It said:

"The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'

"The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging

in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

[2a] Inasmuch as the full Commission believed its approval unnecessary this was a matter considered only by Division 4. See *Louisville & J. B. & R. Co., Merger,* 290 I. C. C. 725, 733, 741, 746. These findings are also printed in the Record on Appeal to the Supreme Court, *Alleghany Corp.* v. *Breswick & Co.*, (353 U. S. 151). See pp. 425, 435, 441-2. The finding of consistency with the public interest, insofar as it related to control was restricted to the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 725, 747; Record, op. cit., p. 443.

[2b] Record, op. cit., pp. 425-7.

[3] Its opinion has not yet been bound. It may be found in the Record on Appeal to the Supreme Court, Record, op. cit., pp. 506-515. The brief discussion of the subject occurs at p. 512.

[4] 134 F. Supp. 132, 143-44; 138 F. Supp. 123, 137-38.

[5] 353 U. S. at p. 161.

[6] In *Louisville & J. B. & R. Co. Merger,* 290 I. C. C. 725, 733, Division 4 said:

"The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. [Citing *Seaboard Air Line Ry. Co. Receivership,* 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization,* 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry. Co. Control,* 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.,* 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.,* 37 M. C. C. 91.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary."

[6] In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block of corporate stock by a single person, or a small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.-Purchase*, 271 I. C. C. 513 (1948).

[7] The findings are to be found in *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at pp. 733, 741, Record, op. cit., pp. 425, 435. (Division 4) and 295 I. C. C. 11, , Record, op. cit., pp. 511-12, 513 (full Commission).

[8] The schedule of Alleghany's investments as of December 31, 1954 was as follows (Record, op. cit., p. 166):

	Cost	*Indicated Market Quotations*
New York Central Securities ..	$ 6,918,118	$ 9,607,800
Alleghany share of joint ventures in Central investments (See Note (3) Record p. 169)	7,500,000	10,050,000
	$14,418,118	$19,657,800
Total investments	$33,342,393	$67,944,633

[9] As to carriers, the usefulness of these assets may also be subjected to other restrictions. See *Bonds of St. Louis-S. F. Ry. Co.*, 150 I. C. C. 139 (1928), in which an unapproved acquisition by a carrier was held to be not capitalizable. The extent to which analogous restrictions might apply to the financing of a person not a carrier is a matter for consideration by the Commission.

[10] The only findings of possible significance in this regard are that the plan was a further step in a program initiated eight years earlier, in September, 1946; that it will eliminate dividend arrearages and give the preferred stockholders an opportunity to participate in the "progress of the applicant". Record, op. cit., pp. 528-530. Contrast the findings by Division 4 as to why Alleghany should be required to report as a carrier notwithstanding the illegality of the manner by which it obtained its status. *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at p. 741.

[11] While the dominant purpose of § 20(a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was "to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing". (Sharfman, The Interstate Commerce Commission, Vol. I, pp. 189, 190).

Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining confidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong., 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190-191 (1931).

> "* * * If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field." -Senate Report No. 304, 66th Cong., 1st Sess. (1919).

See also testimony of Commissioner Clark, Hearings before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, Vol. I, p. 343 (1919); The New England Investigation, 27 I. C. C. 560, 616 (1913); Matter of Consolidations & Combinations of Carriers, 12 I. C. C. 277, 306 (1907); see also 21st Annual Report of Interstate Commerce Commission, p. 24 (1907).

In 1913 and 1916, the House of Representatives passed legislation which substantially incorporated the provisions of the present § 20(a). The House Reports on these bills indicate recognition of the fact that one of the aims of the statute was to protect investors from the abuses of speculative financing. H. R. Report No. 681, pp. 3, 4 (63rd Cong., 2d Sess., 1914); H. R. Report No. 349, pp. 8, 9 (64th Cong., 1st Sess., 1916). This was made explicit by a question addressed to Mr. Rayburn, a member of the House Committee on Interstate and Foreign Commerce, during debate on the 1913 bill:

> "Mr. McKenzie: Is it not one of the main purposes of this bill to give stability and value to railroad stocks and bonds for the protection of the men and women who invest their money in these stocks and bonds in good faith, so that the rate to be charged by the railroads is not the only material fact in the bill?

> Mr. Rayburn: It [the rate charged] is not; but the gentleman's question answers itself and answers it much better than I can, and I thank him for it." 51 Cong., Rec. 9687 (63rd Cong., 2d Sess., 1914).

By exempting carrier securities from any states or Securities and Exchange Commission regulation, Congress has given further evidence that it looks to the I. C. C. to protect the welfare of investors in considering stock issues under § 20(a). It is impossible to believe that Congress could have intended investors in carrier securities to be left without any of the protections afforded other investors. When Congress exempted corporations like Alleghany from compliance with the provisions of the Investment Company Act, it manifested no intent to deprive stockholders in such companies of the safeguards provided for other investment companies, but merely an intent to avoid dual regulation.

In this regard we modify the view we expressed in our earlier opinion, 134 F. Supp. 132, 140, footnote 9, in which we said:

> "The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor."

This was an overstatement; its emphasis upon the Commission's primary responsibility neglected the secondary duty to protect public investors.

[12] It is the practice of the Commission when an application discloses an underlying violation of section 5 to commence its own investigation into the violation which is conducted concurrently with the investigation of the application. In the absence of exceptional circumstances the application will be denied and divestiture ordered. Cases in which applications for merger were denied because of prior unauthorized control are: *Gisinger-Investigation of Control*, 60 M. C. C. 321, 327 (1954); *Transcontinental Bus System, Inc.-Inv. of Control* (Arkansas Motor Coaches), 57 M. C. C. 323 (1951); *Pacific Greyhound Lines-Control and Merger*, 56 M. C. C. 415, 434, 440 (1950); *Hodge-Control*, 40 M. C. C. 499 (1946). In *Gisinger-Investigation of Control, supra.*, 60 M. C. C. 321, 327, 329 (1954) it was said:

> "The application in this proceeding is in effect a request for validation of the existing unlawful control. The merger of the properties is merely a second step to change the form of the control already unlawfully in effect. The act contemplates that consideration be given to 'proposed' transactions under section 5. Although it has been stated that such violations of section 5 are not an absolute bar to approval, each case must be considered on its merits • • • ". (327)

• • •

"• • • In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered". (329).

Cases in which the Commission has refused to approve purchases of stock for this reason are: *Kolowich-Control*, 58 M. C. C. 599, 609 (1952); *Welch-Control*, 56 M. C. C. 505 (1950); *Mooney-Control*, 56 M. C. C. 771 (1950); *Pacific Greyhound Lines-Control and Merger, supra.*, 56 M. C. C. 415, 434 (1950); *Casser-Investigation of Control*, 57 M. C. C. 53, 67 (1950) and 55 M. C. C. 696 (1949); *Hodge-Control, supra.*, 40 M. C. C. 499 (1946); *Manlowe-Control*, 45 M. C. C. 125 (1946). Cases denying applications to transfer operating rights for this reason are: *Interstate Motor Freight System-Purchase*, 65 M. C. C. 37, 53 (1955); *Myrick-Purchase*, 57 M. C. C. 1 (1950); *Jones-Purchase*, 57 M. C. C. 105 (1950); *Texas, New Mexico & Oklahoma Coaches, Inc.-Purchase*, 55 M. C. C. 269 (1948); *Congdon-Purchase*, 50 M. C. C. 781 (1948); *McRae-Purchase*, 45 M. C. C. 633 (1947); *Mitchell-Purchase*, 40 M. C. C. 283 (1945); *Tornetta-Purchase*, 40 M. C. C. 339, 343 (1945).

Similarly, it has refused to approve an issue of securities for the purpose of financing an unapproved acquisition. *Bonds of Chesapeake & O. Ry. Co.*, 150 I. C. C. 257, 259-60 (1929).

[13] Denial of applications is usually accompanied by compelled divestiture, although sometimes left to be accomplished voluntarily or by subsequent proceeding. Divestiture was ordered in *Gisinger-Investigation of Control; Transcontinental Bus System, Inc.-Inv. of Control; Pacific Greyhound Lines-Control and Merger; Myrick-Purchase; Kolowich-Control; Mooney-Control; Casser-Investigation of Control; McRae-Purchase; Manlowe-Control;* op. cit.

[14] In *Casser-Control-Bingler Vacation Tours, Inc.*, 57 M. C. C. 53, 67, the Commission said:

"• • • and we have given our approval to concluded transactions under that section [§ 5] only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon apprisal of the unlawfulness, and the transaction clearly was consistent with the public interest";

The fact that the applicant was in good faith unaware of the illegality, is a significant consideration. *Coast Lines Truck Service,*

Inc.-Control and Merger, 58 M. C. C. 115, 131 (1951); *Consolidated Truck Lines-Control and Merger*, 57 M. C. C. 277, 281 (1951); *Sims-Purchase*, 40 M. C. C. 228, 230 (1945). In some cases applications have also been granted because there is a strong public interest in continuance of service which might be disrupted if divestiture were ordered; in other words, the violation is tolerated in the interest of the public, not out of consideration for the violator. *Baggett-Control*, 65 M. C. C. 522, 525 (1955); *Potomac Coach Lines, Inc.-Purchase*, 57 M. C. C. 199, 207 (1950); *Capitani-Control*, 57 M. C. C. 413, 420 (1951); *Bowman-Control*, 55 M. C. C. 802 (1949); *Commercial Petroleum and Transport-Control*, 58 M. C. C. 439, 459 (1952); *Lee-Control*, 50 M. C. C. 163, 168 (1947). Cf. *Cochrane-Purchase*, 40 M. C. C. 233, 237 (dissenting opinion) (1945).

[15] Although the Commission consistently points out that an illegal acquisition does not become protected by the passage of time or the prior knowledge of the Commission or its grant of other applications, (see *Transcontinental Bus System, Inc.-Inv. of Control, supra.*, 57 M. C. C. 323, 334), there is no doubt that the disruption of the public service by delayed divestiture will weigh against the exercise of this sanction. See *Commercial Petroleum & Transport Co.-Control, supra.*, 58 M. C. C. 439, 459.

[16] The plaintiffs were held not to be interested parties for the purposes of being heard before the entry of the merger and status orders. 353 U. S. 151, 173, 175.

[17] Cf. Division 4 findings, *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, 741; Record, op. cit., p. 435.

Final Judgment

[Same Title]

This action to enjoin and set aside certain orders of the Interstate Commerce Commission authorizing Alleghany Corporation to issue certain stock and to enjoin Alleghany Corporation, having come on for final hearing, on remand from the Supreme Court of the United States, on September 5, 1957, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325 of Title 28 of the United Code, consisting of the undersigned judges; and the court having considered the pleadings, evidence and the briefs and having heard the arguments of counsel for the respective parties, and being fully advised in the premises; and on September 27, 1957 having filed its opinion herein containing its findings of fact and conclusions of law; now, in accordance with said opinion, findings and conclusions, it is

Ordered, Adjudged and Decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

Further Ordered, Adjudged and Decreed that Alleghany Corporation, its transfer agents, officers, directors,

servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of the order of this court upon the mandate from the Supreme Court of the United States, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany Corporation, its transfer agents, officers, directors, servants or employees, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany Corporation, and its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock delivered prior to the stay granted by Mr. Justice Harlan on August 3, 1955 in connection with the previous appeal herein.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time upon the expiration of the stay provided herein for such further orders and directions as may

be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Dated: New York, N. Y.
October 17, 1957.

CHARLES E. CLARK
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

Opinion

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Submitted April 14, 1955 *Decided May 26, 1955*

Authority granted to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of applicant's cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth herein. Condition prescribed, and the order made effective 10 days from its date.

BURTON K. WHEELER and EDWARD K. WHEELER for applicant.

GEORGE BRUSSEL, JR. and JOSEPH B. HYMAN for interveners in opposition to the application.

RANDOLPH PHILLIPS, *pro se*, intervener in opposition.

DIVISION 4, COMMISSIONERS JOHNSON, MITCHELL, AND TUGGLE BY DIVISION 4:

The Alleghany Corporation, by an application filed February 18, 1955, applied for authority under section 20a of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6-percent convertible preferred stock, hereinafter sometimes called 6-percent preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½-percent preferred stock, series A, hereinafter sometimes called series A preferred stock, and to issue not exceeding 14,768,352 shares of its common stock, upon conversion of such 6-percent preferred stock. No representation respecting the application has been made by State authority. By order entered April 20, 1955, Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, alleged stockholders of the applicant, were permitted to intervene in opposition to the application. These interveners requested that the application be assigned for hearing, but they described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment. In our opinion, no hearing is necessary to enable us to determine our decision upon the application.

The applicant was incorporated under the laws of the State of Maryland on January 26, 1929. It is authorized by its certificate of incorporation, as amended, among other things, to acquire by purchase, subscription, or otherwise, and to own, hold for investment, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of securities. Its holdings include the securities of certain railroad companies, including the New York Central Railroad Company.

By our order of March 2, 1955, in Finance Docket No. 18656 et al., *Louisville & Jeffersonville Bridge & R. Co. Merger*, 290 I. C. C. ——, we approved and authorized, among

other things, subject to certain conditions, merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation. The order further provided that unless and until otherwise ordered by this Commission, the Alleghany Corporation is to be considered as a common carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

At a special meeting held on December 28, 1954, applicant's board of directors, hereinafter called the board, resolved that it was desirable that applicant's certificate of incorporation, hereinafter called the certificate, be amended to create 1,367,440 shares of a new class of stock to be known as 6-percent convertible preferred stock, par value $10 a share, convertible into shares of common stock, junior to the class of its $4 prior preferred convertible stock and senior to the existing class of preferred stock (of which the series A preferred stock is a series), and to its common stock, and to increase the authorized shares of common stock from 12,350,000 to 22,000,000 shares, so as to provide a sufficient number of shares into which such 6-percent preferred stock will be convertible. At a special meeting of applicant's stockholders held on February 8, 1955, as required by the certificate, the holders of two-thirds of the outstanding shares of $4 prior preferred convertible stock and of substantial majorities of the outstanding shares of series A preferred stock and common stock, voting as separate classes, approved the proposed amendments, and on that date appropriate articles of amendment of the certificate were filed with the State Tax Commission

of the State of Maryland. The certificate, as so amended, provides for a total authorized capital stock of 24,895,807 shares, comprised of 28,367 shares of $4 prior preferred convertible stock, without par value, 1,367,440 shares of 6-percent preferred stock, par value $10 a share, 1,500,000 shares of preferred stock, par value $100 a share, and 22,000,000 shares of common stock, par value $1 a share.

Pursuant to a resolution adopted by the executive committee of the board at a special meeting held on February 9, 1955, applicant proposes to issue, subject to receipt of our authorization not later than May 31, 1955, not exceeding 1,367,440 shares of the new 6-percent preferred stock in connection with an exchange of such stock for shares of its series A preferred stock, and not exceeding 14,768,352 shares of its common stock upon conversion of such 6-percent preferred stock, pursuant to an exchange offer dated February 10, 1955. Under such offer, the holders of applicant's outstanding series A preferred stock are given an opportunity to exchange their shares on the basis of 10 shares of 6-percent preferred stock for each share of series A preferred stock, subject to the approval of this Commission on or before May 31, 1955, and to the condition that 100,000 shares of series A preferred stock, or such lesser number as its board may deem sufficient to warrant consummation of the exchange offer, will be offered for exchange. The offer is open to all such holders until 3:30 p.m. eastern standard or daylight saving time, whichever is then in effect in the city of New York, on the closing date, which, under applicant's proposal, will be the fifth day (excluding Saturday, Sunday, and any legal holiday) after we have issued an order, substantially in the form requested, authorizing the proposed issue. Any holder of the series A preferred stock may accept the offer and deposit for exchange all or any number of full shares held by him. He may revoke his acceptance of the offer as a whole or in part and direct the return of the deposited stock, by written notice to the exchange agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 p.m., on

the closing date. As soon as practicable after that date, if the required number of shares of series A preferred have been accepted by the exchange agent for exchange, the applicant will issue and deliver the required number of shares of 6-percent preferred stock in temporary form in accordance with the instructions set forth in the letter of transmittal accompanying the certificates surrendered. The applicant has reserved the right to extend the exchange offer for an additional period or periods. However, regardless of such possible extension or extensions, the conversion rights of the 6-percent preferred stock will be fixed as of the closing date and all shares tendered for exchange on or before 3:30 p.m. on that date will be exchanged as of such date. If the applicant determines not to consummate the exchange offer because less than 100,000 shares of series A preferred stock have been duly submitted for exchange or the requisite authority has not been granted by us on or before May 31, 1955, or if our order denies any material portion of the application or imposes terms or conditions which are not acceptable to it, the exchange offer will be void and the surrendered stock certificates will be returned to their respective owners. All exchanged shares of series A preferred stock will be retired. All costs and expenses of the exchange will be borne by the applicant except the expense incurred by the stockholders in delivering their stock to the exchange agent.

Of the series A preferred stock outstanding as of January 31, 1955, the chairman of applicant's board and his wife were the beneficial owners of 11,087 and 3,738 shares, respectively, and two other members of the board were beneficial owners of 12,959 and 500 shares, respectively. These holdings, aggregating 28,284 shares, represent approximately 20.7 percent of the 136,744 shares outstanding in the hands of the public. The application represents that these stockholders each has the present intention of tendering approximately the same proportion of their holdings of such stock, as compared with the total number of shares thereof then outstanding, as are tendered by other persons. However,

none of them has entered into any agreement with applicant, or is under any obligation to do so, each of them reserving the right to take whatever action may at the time be deemed desirable in his own interest under the circumstances existing at the time such stockholder makes his final decision. The three members of the board hereinbefore mentioned, as of January 31, 1955, were beneficial owners of 547,500 shares, or approximately 11.8 percent, of the 4,637,797 shares of applicant's common stock outstanding. Also, on that date, two of these directors and the wife of the chairman were beneficial owners of subscription warrants entitling them to purchase, in the aggregate, 241,940 shares of applicant's common stock at a price of $3.75 a share; and the chairman was the beneficial owner of options to purchase 100,000 shares of such stock at a price of $3.0625 a share.

If the exchange offer is consummated, the board intends, following the issuance of the 6-percent preferred stock, thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of Series A preferred stock at the annual rate of $5.50 a share. It should be noted, however, that neither the dividend requirements of the series A preferred stock nor of the 6-percent preferred stock were earned from portfolio income in either 1953 or 1954. Because of the uncertainty as to the number of shares of series A preferred stock which may be surrendered, the board is not prepared presently to decide whether it will call for redemption the unexchanged shares or to what extent, except as hereinbefore stated, it will pay dividends on account of arrearages thereon.

The applicant has certain bank loans, two of which are evidenced by promissory notes, one to the Chase National Bank of the City of New York, authorized by our order of August 6, 1951, in Finance Docket No. 17423, *Alleghany Corporation Note*, 282 I. C. C. 807, and the other to The First National Bank of Boston, authorized by our order of September 3, 1952, in Finance Docket No. 17871, *Alleghany Corporation Notes*, 282 I. C. C. 817. The applicant has agreed, in connection with these two loans, as well as in the

indenture pursuant to which its 5-percent sinking-fund debentures, due November 1, 1962, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities*, 282 I. C. C. 818, were issued, among other things, not to pay, without the consent of such banks and the holders of two-thirds of the aggregate principal amount of outstanding debentures, any cash dividends or other distribution on, or to purchase, redeem, or otherwise retire, any shares of its capital stock, except in exchange for other shares of its capital stock, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should applicant decide to redeem unexchanged shares of series A preferred stock, such redemption might conceivably require the consent of such banks and debenture holders.

A description of each class of applicant's stock, with preferences, conversion and other rights of each class of the authorized stock, is set forth in the certificate.

The rights of holders of the 6-percent preferred stock and the series A preferred stock will be similar in many respects but there will be substantial differences as mentioned hereinafter. The 6-percent preferred stock is senior to the series A preferred stock and to the authorized but unissued preferred stock of which class the series A preferred stock is a series. The 6-percent preferred stock has a par value of $10 a share, whereas the series A preferred stock has a par value of $100 a share. When, and as declared by the board, the latter stock is entitled to cumulative dividends at the rate of 5½ percent per annum in preference to the common stock, whereas the 6-percent preferred stock is entitled to cumulative dividends at the rate of 6-percent per annum in preference to both the series A preferred and common stock. Dividends on the 6-percent preferred stock will be payable semiannually on April 1 and October 1, will be cumulative from May 1, 1955, and will begin October 1, 1955. The redemption value used in the conversion formula set forth below

takes into account the fact that dividends on the 6-percent preferred stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor. Regarding 10 shares of the 6-percent preferred stock as the equivalent of 1 share of the series A preferred stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6-percent preferred stock before any payment is made to the holders of the series A preferred stock. However, because the dividend arrearages on the series A preferred stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of 1 share of series A preferred stock on May 1, 1955, will be $237, whereas that of 10 shares of 6-percent preferred stock would aggregate $105, the difference of $132 representing accumulated and unpaid dividends. In the event of voluntary liquidation or dissolution of the applicant, or upon redemption, the holders of 6-percent preferred stock will be entitled to receive, before any payment is made to the preferred or common stockholders, $10.50 a share, and in case of involuntary liquidation or dissolution $10 a share, plus, in each instance, all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of series A preferred stock is in each such instance entitled to an amount (exclusive of dividend arrearages) equal to 10 times the equivalent amount set forth with respect to each share of 6-percent preferred stock. There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the applicant, by the express terms of its certificate, is precluded from redeeming any shares of 6-percent preferred stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of series A preferred stock. Neither class

of stock is entitled to preemptive rights. The series A preferred stock is entitled to the benefits of a sinking fund, the provisions of which are not operative at the present time because of accumulated dividends in arrears. In case of default in the payment of four quarterly installments of dividends on such stock, or the elapsing of 24 consecutive months during which applicant shall at no time have fully paid up all dividends thereon, such stock is entitled to elect two directors. Because of the default in the payment of dividends thereon, such stock is now entitled to elect two directors. There is no provision for a sinking fund for the 6-percent preferred stock. The holders thereof, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid. The series A preferred stock is not convertible. The holder of each share of 6-percent preferred stock, at any time prior to 5 days before its redemption, will, upon payment to applicant of $3.75 per share of common stock into which such share is convertible, be entitled to convert such share into such number of fully paid and nonassessable shares of common stock, without adjustment for dividends in respect of either such share or the shares of the common stock into which it is converted, as shall be arrived at by dividing 23.7 (being 1/10 of the May 1, 1955 redemption price per share of series A preferred stock) by the difference between $3.75 and an amount equal to the closing price of the common stock on the New York Stock Exchange on the closing date of the exchange offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6-percent preferred stock be convertible into more than 10.8 shares of common stock. At the time of the original issuance of the 6-percent preferred stock, the holders thereof will be advised by letter and by printed endorsement on the certificates represent-

ing such stock of the number of shares of common stock into which each share of 6-percent preferred stock is convertible upon payment of $3.75 per share of common stock. No fractional shares or scrip representing fractional shares will be issued upon such conversion. If the aggregate number of shares of 6-percent preferred stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of common stock, the number of shares of common stock issuable upon such conversion shall equal such whole number, and an amount equal to such fraction multiplied by the excess of the closing price on the New York Stock Exchange of the common stock on the effective date of such conversion (or if no sale took place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 will be paid in cash by the applicant to such holder. In the event of any reclassification, exchange or other change of the common stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of common stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of the 6-percent preferred stock will be adjusted accordingly.

The affirmative approval of the holders of a majority of the outstanding shares of series A preferred stock is required before applicant may issue any additional shares of such stock or of any other class of stock on a parity with or having priority thereover. The issuance of any shares of stock on a parity with or having priority over the 6-percent preferred stock, or the making of any material change in applicant's certificate or bylaws, with respect to the latter stock, requires the affirmative approval of the holders of two-thirds of the outstanding shares thereof. As of February 16, 1955, 144,544 shares of series A preferred stock, out of an authorized 1,195,000 shares, were issued, of which 7,800 were held in applicant's treasury and 136,744 shares were outstanding in the hands of the public, held by

approximately 1,186 stockholders. None of the 6-percent preferred stock has been issued.

The series A preferred stock and the common stock are listed on the New York Stock Exchange and applicant intends to make application to list on such Exchange the 6-percent preferred stock and the common stock into which such stock may be converted.

J. P. Morgan & Co. Incorporated, and Colonial Trust Company, both of New York City, have been named as transfer agent and registrar, respectively, of the 6-percent preferred stock.

Of the authorized common stock, 4,641,585 shares were issued and outstanding in the hands of the public as of January 31, 1955, held by approximately 15,120 stockholders, including 8 directors of applicant who were the beneficial owners of 578,846 shares; 410,032 shares were reserved for issue upon conversion of the presently outstanding $4 prior preferred stock, 1,999,700 shares were reserved for issue upon exercise of the presently outstanding common stock subscription warrants of the applicant, and 100,000 shares were reserved for issue upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of common stock, to be sold to directors, officers and employees of the applicant upon exercise of options or otherwise, but such shares have not yet been sold, options covering them have not yet been granted, and such shares have not been reserved. Each holder of common stock is entitled to one vote for each share on matters on which such stock is entitled to vote, including the election of directors. There is no provision for cumulative voting of common stock. Upon liquidation or dissolution of the applicant, the holders of such stock will be entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the preference stocks. The holders of common stock are entitled to purchase ratably, according to their respective holdings, any

shares of common stock issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such stock for cash, in either case upon appropriate terms, but with certain designated exceptions, one of which includes any shares of common stock issued upon conversion of preferred stock convertible into common stock. Consequently, the shares of common stock proposed to be issued and sold upon conversion of the 6-percent preferred stock would not be subject to preemptive rights. The $3.75 which applicant will receive for each share of common stock issued upon conversion will be used for its general corporate purposes.

During January 1955, the high and low sales prices per share on the New York Stock Exchange of the series A preferred stock were $228 and $209.50, respectively, and of the common stock were $9.50 and $7.25, respectively.

As of January 31, 1955, there were issued and outstanding common stock subscription warrants of the applicant in bearer form, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities, supra* entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued common stock at a price of $3.75 a share, which shares have been reserved for such purpose. Such warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the applicant, and no dividend or interest is payable or accrues with respect thereto or to the shares of common stock which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such warrants are exercised. These warrants are listed on the American Stock Exchange.

In September 1946, the applicant inaugurated a program of purchasing in the open market its own prior preferred convertible stock and series A preferred stock, and of presenting to the holders of those stocks a series of exchange offers and invitations for tenders with the object of benefiting the remaining holders of such preference stocks, and

eventually restoring an asset equity for the common stock. As a result of this program, the applicant has eliminated the prior preferred convertible stock from its capital structure and drastically reduced the amount of its series A preferred stock outstanding, has eliminated substantial amounts of dividend arrearages, and the capital deficit has been wiped out.

The proposed issue of 6-percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years. Applicant's management is of the opinion that the proposed exchange offer is in the best interests of applicant and the holders of all three outstanding classes of its stock. No dividends were paid on any class of its stock from May 1, 1931, through the year 1949, nor in 1953. Dividends of $2.50, $5 and $10 a share were paid on its prior preferred convertible stock in 1950, 1951, and 1952, respectively. A dividend of $4 a share was paid on its $4 prior preferred stock in 1954. The aggregate cash dividends paid in 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470, and $103,380, respectively. Assuming a 100-percent exchange of series A preferred stock and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 prior preferred stock and 1,367,440 shares of 6-percent preferred stock, the aggregate dividend requirements for each class of such stock would be $103,380 and $820,464, respectively. Applicant expects its portfolio income during 1955 to be sufficient to meet the dividend requirements on all classes of its preferred stock. In addition, it expects to realize substantial income from the sale of securities, which income is also available for the payment of dividends.

The dividend accumulations on the series A preferred stock must be paid before dividends may be paid on the common stock. To the extent that the series A preferred stock is redeemed instead of exchanged, or dividend arrear-

ages thereon are paid in cash, applicant's assets will be reduced by the aggregate redemption price of the stock redeemed, and its income, derived from investments, may be reasonably expected to be reduced accordingly.

The conversion rights of the 6-percent preferred stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock. Although their existence will not have any immediate effect on the common stock, the exercise thereof will at that time have the effect of diluting the rights of the common stockholders, as such rights then exist. Assuming that the 136,744 presently outstanding shares of series A preferred stock are exchanged and the shares of 6-percent preferred stock are ultimately converted into common stock, and assuming closing prices of such common stock of $6 and $8.375 a share, there would be required to be issued 14,358,120 and 6,973,944 shares of common stock or about 75.6 and 60.1 percent, respectively, of all shares thereof outstanding upon giving effect to such conversion, for which applicant would receive an aggregate of $53,842,950 and $26,152,290, respectively, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion) which cash will be available for working capital and investment.

The short term effect of the exchange of series A preferred stock for 6-percent preferred stock will result in a substantial increase in the net asset value per share of applicant's common stock by reason of the elimination of arrearages on the series A preferred stock. The 6-percent preferred stock is not redeemable by the applicant until May 1, 1970, thereby precluding forced conversion for the period. Consequently, it is expected that at least until dividends are paid on the common stock, a substantial part of the 6-percent preferred stock will remain unconverted and outstanding. However, to the extent that the 6-percent preferred stock is converted into common stock, such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share.

The applicant's general balance sheet as of November 30, 1954, in which investments are shown at cost, less an adjustment reserve, shows the following items, among others:

Assets		
Total investments		$43,264,637
Current assets		8,256,621
Deferred assets		7,075
Unadjusted debits		1,362,699
Total assets		$52,891,032
Liabilities		
Capital stock		
$4 prior preferred convertible	$ 2,067,600	
Preferred	13,674,400	
Common	4,637,797	
Premiums on common stock	142,297	
Total stock		$20,522,094
Long-term funded debt unmatured		
Book liability	$21,200,000	
Reacquired and held in treasury	504,000	
Total long-term debt		20,696,000
Current liabilities		2,427,929
Deferred liabilities		2,050
Surplus—unearned	$106,976,335	
earned—appropriated	718	
earned—unappropriated (deficit)	97,734,093	
Total surplus		9,242,960
Total liabilities		$52,891,032

Another balance sheet statement of applicant as of the same date, but reflecting certain investments in securities at values based on market quotations on that date, shows total assets of $82,069,676 and total surplus $38,645,208. Its income statements for 1951, 1952, 1953, and the first 11 months of 1954 show net income, exclusive of profit and loss on security transactions, of $920,378, $861,652, $244,222, and $161,593, respectively. These statements also show that from the sale of securities applicant sustained a net loss of $605,037 in 1951, and gains of $50,806, $6,452,830, and $1,357,640 in 1952, 1953, and the 11-month period in 1954, respectively.

It is pointed out by applicant that on the basis of an exchange of 100,000 shares of series A preferred stock and redemption of the remaining 36,744 shares, the arrears of dividends thereon would be eliminated at a cost of about one-fourth the amount of cash that would be required to redeem all such stock, and if all the stock should be exchanged, the accumulated dividends would be eliminated entirely without the expenditure of any cash. The aggregate accrued dividends on such stock as of January 31, 1955, were $17,862,185 or $130.625 a share. Inasmuch as there is no dividend arrearage on the $4 prior preferred stock and dividends are currently being paid thereon, the 6-percent preferred stock would be entitled to receive dividends on a current basis.

Applicant has entered into an agreement, dated February 8, 1955, with Kidder, Peabody & Co., as dealer manager, whereby the latter agrees to use its best efforts to form and manage a group of securities dealers, including itself, to solicit acceptances of the exchange offer by holders of series A preferred stock. The soliciting dealers, including the dealer manager, will receive a commission of $1 for each share of series A preferred stock submitted through them to the exchange agent and exchanged in accordance with the exchange offer; provided, however, that the maximum aggregate commissions payable with respect to any single holder of record will be $300, except in certain cases

in which the stock is beneficially owned by others. The payment of such soliciting dealers' commissions is subject to the exchange offer being consummated. The dealer manager will be reimbursed for its out-of-pocket expenses up to $2,000, and if the exchange offer is consummated, it will receive the additional sum of $10,000, as a flat fee for its services and an amount equal to the aggregate commissions payable by it as dealer manager to the soliciting dealers, including itself, as provided in the agreement. The applicant will not solicit such exchanges. The dealer manager is not authorized to act as agent of the applicant and the soliciting dealers are not authorized to act as agents of the applicant or of the dealer manager.

The expenses to be incurred in connection with the proposed issue of 6-percent preferred stock, and common stock upon conversion thereof, cannot be estimated accurately at the present time because of the uncertainty of certain features of the transactions, including the number of certificates that will have to be handled. Certain other expenses, such as counsel fees, printing, and other items shown in the application are estimated at $70,580.

The proposed issue comes within exceptions (1) and (2) set forth in the Commission's report of May 8, 1944, in Ex Parte 158, *In Re Competitive Bidding in Sale of Securities*, 257 I. C. C. 129 (164), and competitive bidding is, therefore, not required in connection therewith.

Interveners allege that the exchange offer and the proposed issuance of securities are not for lawful objects within the corporate purposes of the applicant, are not compatible with the public interest, are unfair and inequitable to the holders of its common stock, and will result in unjust enrichment of the holders of the series A preferred stock; but, except to the limited extent mentioned below, their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair.

Interveners state that issue of stock as proposed will dilute the equity of the common stock and, as a result

thereof, holders of such stock will not receive a fair and just return on the present value of their investments. We have already pointed out that conversion of the 6-percent preferred stock will result in diluting the rights of the common stock. However, such fact does not make the proposal unfair, as compensating advantages, which have been described, will accrue to the common stockholders. The ultimate worth of the conversion rights, which holders of the series A preferred stock who accept the exchange offer will receive in partial satisfaction for the surrender of their rights to accrued and unpaid dividends, will be, of course, contingent upon the future value of the common stock. The immediate effect of the exchange of series A preferred stock for the 6-percent preferred stock will be to increase the net asset value of the common stock.

Interveners state that the common stockholders have not been protected by "arms-length bargaining" between persons owning or representing only common stock and owners or representatives of the other classes of securities affected by the transactions, and that the terms of the transactions have been imposed solely by management interests under the domination and control of the chairman of applicant's board of directors, whose total investment in series A preferred stock, with that of his wife, exceeds that in the common stock. A sufficient answer to this contention appears to be furnished by the fact that the charter amendment authorizing the issue and exchange of the 6-percent preferred stock was approved by the votes of holders of 3,269,217 shares of applicant's common stock, which constituted 70 percent of the total outstanding common stock and more than 97 percent of the common stock voted on such proposal. As of January 31, 1955, the directors of applicant owned 578,846 shares of common stock and the bulk of this (516,500 shares) was beneficially owned by its president, who owned only 12,959 shares of series A preferred stock. Based on high sales prices of these stocks in January, recited above, this person's investment in common stock was approximately 69 percent greater than his invest-

ment in preferred stock. In addition, he beneficially owned warrants entitling him to purchase 226,340 shares of common stock.

Other allegations of interveners raise questions as to the necessity of the proposed exchange, and they suggest that applicant should devote its available resources to the redemption and retirement of the series A preferred stock instead of making new investments and extending the risk of the common stock's equity. It is not our function to substitute our judgment for that of management, where the latter has exercised sound discretion and where as here the findings required by the statute as a condition to approval of the issue of securities properly may be made.

It does not appear that the proposed issue will adversely affect any carrier under the control of the applicant, or impair such carriers' ability to serve the public. Nor, with the modification hereinafter stated, does it appear that the proposal will be unfair or inequitable to any class of the applicant's stockholders.

In order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6-percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be, our approval of the proposed issue of stock will be conditioned upon modification of the exchange offer so that, in lieu of the provision under which the conversion rights would be dependent upon the price of the common stock on a date subsequent to our order, the conversion ratio will be dependent upon the closing price of applicant's common stock on the New York Stock Exchange on the last day preceding the date of our order, or if no sale takes place on that day, on the closing price on the last preceding day on which a sale is made.

Subject to the foregoing condition, we find that the proposed issue by the Alleghany Corporation of not exceeding 1,367,440 shares of 6-percent convertible preferred

stock, par value $10 a share, and not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of the 6-percent convertible preferred stock, as aforesaid, is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation, that it will not impair the ability of any such carrier to perform such service, that it is otherwise consistent with the public interest, and that it (a) is for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by such carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 26th day of May, A. D. 1955.

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

IT IS ORDERED, That, subject to the condition stated in the aforesaid report, the Alleghany Corporation be, and it is hereby, authorized to issue (a) not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth in the application and aforesaid report, the proceeds from the issue of such common stock to be used for general corporate purposes;

IT IS FURTHER ORDERED, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission;

IT IS FURTHER ORDERED, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August

9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C. F. R. 56);

IT IS FURTHER ORDERED, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

IT IS FURTHER ORDERED, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States; and

IT IS FURTHER ORDERED, That this order shall be effective 10 days from and after its date.

By the Commission, division 4.

HAROLD D. MCCOY,
Secretary.

(SEAL)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 22nd day of June, A. D. 1955.

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Upon consideration of the record in the above-entitled proceeding, the petition filed June 2, 1955, by Breswick & Co., et al., requesting reconsideration of the report and order by division 4, filed and entered herein May 26, 1955, and applicant's reply to the petition; and

It appearing, That the alleged "Protective Committee for Common Stockholders of the Alleghany Corporation", which joined in the said petition and prayed for leave to intervene herein, is not a party of record and is not entitled to file a petition for reconsideration, and has not complied with the Commission's General Rules of Practice and the provisions of its order, by division 4, of August 9, 1946 (49 C. F. R. 56.3 (d)), relating to petitions for leave to intervene; and

It further appearing, That the material matters set forth in the petition were considered by division 4 and discussed in its report, and that the petition presents no facts or arguments which warrant reconsideration;

It is ordered, That all references to the said alleged protective committee contained in the petition be, and they are hereby, stricken therefrom; and

It is further ordered, That the said petition be, and it is hereby, denied, and that the said order of May 26, 1955, by division 4, shall be effective as of the date hereof.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX B

Relevant portions of § 5 and § 20a of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 5 and 20a, read as follows:

Unifications, mergers, and acquisitions of control

§ 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

§ 5(2)(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers

by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Non-carrier deemed carrier upon acquiring control

§ 5(3) Whenever a person which is not a carrier is authorized, by an order entered upon paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this chapter, sections 304 (a) (1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a (2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper perform-

ance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

Control effected by other than prescribed methods

§ 5(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

Investigation by Commission of effectuation of control by non-prescribed methods

§ 5(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such persons to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

Jurisdiction of injunctions, etc., against violations of section or orders

§ 5(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of the injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Supplemental orders by Commission

§ 5(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

Issuance of securities; assumption of obligations; authorization

§ 20a(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance

by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

Scope of commission's authority

§ 20a(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

Securities issued contrary to law void; effect; penalty

§ 20a(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.

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